Oppose Senate Bill 77

The members of the Michigan Association for Justice oppose Senate Bill 77 because it drastically shortens the period of limitations for filing a claim against an architect or engineer whose negligent or defective work has caused someone harm.

- Injuries involving buildings tend to occur from latent defects. The shorter the period of limitations the less time to notice of problems with a building's structure that slowly deteriorates and to find out all of the facts concerning who participated in the construction and design of the building before filing a case.
- The period is already quite short considering its purpose. Buildings should be expected to last longer than 6 years before those who designed or built them are no longer responsible their negligence.
- The proponents of the bill previously argued the opposite side of this argument when seeking a change in the law in 1987. A change in the law to clarify that the law should be understood to apply exactly as the Court applied it in the *Ostroth* case (the Michigan Supreme Court case this bill would overturn).

The History

The period of limitations overlapping the period of repose (as the law currently stands post-*Ostroth*) was written and enacted first in 1967. A 1980 Supreme Court decision (*O'Brien*, 401 Mich 1 at 115) supported this view.

In 1985, the law was amended to increase the period of repose to 10 years and added a provision for a one year discovery "look back" in the event of "gross negligence."

In 1987, the law was amended again to make the clarifications noted in the *Ostroth* decision – amendments which were supported and encouraged by the architects and engineers. In 1992, the *Michigan Millers Mutual Insurance Co. v. West Detroit Building Co., Inc.,* 196 Mich. App. 367 *(1992)* case upheld that clarification. Then in 1994, the *Witherspoon v. Guilford,* 203 Mich. App. 240 (1994) case upheld the bill's proponents' position that a statute of limitations period should be allowed to run within the statute of repose.

It was not until the *Ostroth* case was taken to the Michigan Supreme Court that the discrepancy between these to conflicting appellate court cases was resolved. At that point, that Supreme Court unanimously held that the position of the bill's proponents and the holding in *Witherspoon* were incorrect.

The proponents of SB 882 fought for the opposite reading of the law in 1987.

In 1987, the State Society of Architects and Engineers, sought a legislative fix to this section of law in an effort to clarify two court decisions which had at muddied the waters concerning how the statute of limitations worked. That fix was intended to "clarify the statute of limitation, which is 6 years" according to the Society's lobbyist at that time – Dennis Cawthorne. See attached Supreme Court brief, Page 11 – 13.

alternatives--is the Legislature's, not the judiciary's. *Henry v Dow Chem Co*, 2005 Mich LEXIS 1131 (2005) *Citing, Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1990).

C. The Legislative History of MCL 600.5805(14) Indicates That This Amendment was Lobbied For by the Construction Industry and Designed to Clarify that the Six-Year Period of Limitation Would Apply to All Claims.

Denying that the legislature intended to supply a uniform six-year period of limitation and repose for the type of claim before the Court becomes even more difficult when the Michigan Archives available for this matter are examined. Many of the parties with interest in this matter hired lobbyists to support MCL 600.5805(10) now (14), back in 1987 when it was introduced. Furthermore, Courts may look to the legislative history of a statute to ascertain its meaning. *See, e.g. People v Hall*, 391 Mich 175; 215 NW2d 166 (1974) and *Luttrell v Dept of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

Counsel for Appellees has previously provided the Court with State of Michigan Archives documents and recordings for its review. Ecorse will not duplicate those here. The minutes from the Michigan Senate Judiciary Committee hearing memorializing the debate over what would become Senate Bill 478 of 1988 contain the construction industry's understanding of what MCL 600.5805(10) would serve to accomplish. Dennis Cawthorne, a well-known lobbyist and attorney currently practicing in Lansing, represented the State Society of Architects/Engineers at the October 15, 1987 hearing. From the meeting minutes and the recording of the hearing, it is clear that the architects and engineers ". . . supported the bill and explained the purpose of this bill is to clarify the statutes of limitations, which is six years." Mike Crawford, of the Construction Association of Michigan also, ". . . supported SB 478 and indicated the bill does not change policy, it clarifies it." Based on this testimony alone, the bill was voted out of committee unanimously.

The House of Representatives Judiciary Committee also reported on SB 478 favorably and unanimously on March 15, 1988. It was urged to do so, once again, by the State Society of Architects/Engineers through the representation of Dennis Cawthorne. Attorney Cawthorne drafted a letter on firm letterhead urging the House to act as the Senate had and pass SB 478. In his letter, Mr. Cawthorne indicates the understanding that the amendment is to clarify the original intent of section 5839 that all suits against architects, engineers and contractors are subject to the time limits in that statute. This amendment was necessary due to Appeals Court decisions that had "muddied the waters"

Judging by the ruling in *Michigan Millers, supra* in 1992 and the language of the statutes at issue, it seemed as though the six-year period of limitation was established and understood. The Michigan legal community was made more aware of the effects of section 5805(10) (now (14)), through academic means as well. Published in the October 1992 Michigan Bar Journal, Cynthia M. Martinovich authored an article titled: *Two, Three, Now It's Six, Architects and Engineers are in a Fix*. This article discusses the exact same issue, as is now, some thirteen years later, being addressed by this Court. So sure of the application of section 5839 as the correct period of limitation, that Ms. Martinovich wrote the following:

> Application of Section 5839 became compulsory following a recent amendment to the Revised Judicature Act. The amendment, Section 5805(10), reads, 'the period of limitations for an action against a state licensed architect, professional engineer or contractor based on an improvement to real property shall be as provided in Section 5839.' Accordingly, Section 5805(10) incorporates Section 5839, a pre-existing minimum six-year limitations period . . ..
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> Although there is no case law interpreting Sections 5805(10) and 5839(1), it is now indisputable that the correct limitations period for a tort claim against an engineer or architect is at least six years . . .. 72 Mich B J 1038 (1992).